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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Phoenix Cash and Carry, LLC,)

No. CV-08-01261-PHX-NVW

10 Plaintiff,)

ORDER

11 vs.)

12 U.S. Smokeless Tobacco Brands, Inc.,)

13 Defendant.)
14)
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16 Phoenix Cash and Carry LLC (“Cash and Carry”) filed suit against U.S. Smokeless
17 Tobacco Brands Inc. (“U.S. Smokeless”) alleging breach of contract, breach of the implied
18 covenant of good faith and fair dealing, unjust enrichment, and tortious interference claims.
19 (Doc. # 1.) U.S. Smokeless filed a Motion to Dismiss (Doc. # 12), arguing that Cash and
20 Carry failed to state a claim. Although the pleadings will support no other cause of action,
21 Cash and Carry has alleged a prima facie case for equitable relief under the doctrine of
22 promissory estoppel. Therefore, the Motion will be granted in part and denied in part.

23 **I. Background**

24 When a defendant moves to dismiss for failure to state a claim, factual allegations
25 contained in the complaint are taken as true. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200
26 (2007). According to the allegations, Cash and Carry operates a tobacco distribution
27 business throughout Arizona. The company was formed in 2005, and soon after, it sought
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1 to become a distributor for U.S. Smokeless. U.S. Smokeless refused this overture, choosing
2 to do business with another newly formed company instead.

3 Cash and Carry persevered in its operations and by 2007 had entered into an
4 agreement with Fry's Supermarkets ("Fry's") to supply their Arizona stores with tobacco.
5 In order to meet the Fry's demand for U.S. Smokeless products, Cash and Carry placed
6 weekly bulk orders at other retail stores—Sam's Club and Costco—purchasing over
7 \$250,000 worth of U.S. Smokeless products from those stores between January 2007 and
8 May 2007. U.S. Smokeless knew of these arrangements because Cash and Carry told U.S.
9 Smokeless about its relationship with Fry's. Moreover, Cash and Carry's bulk retail orders
10 required advance notice to U.S. Smokeless.

11 The U.S. Smokeless products at issue have a shelf life of 30 days, after which time
12 they become a loss. In or around March 2007, Fry's found itself with some quantity of
13 expired U.S. Smokeless products. A three-way discussion broke out between Cash and
14 Carry, Fry's, and U.S. Smokeless. Fry's sought confirmation that it could return these
15 products to Cash and Carry. U.S. Smokeless told Cash and Carry that it would credit Cash
16 and Carry for any expired product that Fry's returned. Cash and Carry then accepted returns
17 from Fry's. Contrary to its previous assurance, however, U.S. Smokeless refused to credit
18 Cash and Carry for accepting the returns.

19 In early May 2007, Cash and Carry had placed large orders for U.S. Smokeless
20 products at Sam's Club. Cash and Carry took delivery of those products, intending to resell
21 them to Fry's. As it turned out, Fry's had agreed to have its parent company supply U.S.
22 Smokeless products and had no need to buy from Cash and Carry any longer. Both Fry's and
23 Cash and Carry asked U.S. Smokeless to accept a return of the products Cash and Carry had
24 purchased. U.S. Smokeless stated that it would accept the returns at Sam's Club. Cash and
25 Carry declined to liquidate the products prior to their expiration date. After the products had
26 expired, Cash and Carry learned that U.S. Smokeless had instructed Sam's Club not to accept
27 its returns.

1 The members of Cash and Carry are immigrants to the United States and are of Syrian
2 and Armenian descent.

3 **II. Analysis**

4 Citing a number of contract and equitable theories, Cash and Carry contends that U.S.
5 Smokeless should bear the losses associated with the two refusals to accept returns. Cash
6 and Carry also contends that U.S. Smokeless wrongfully profited by its behavior and
7 tortiously interfered with the relationship between Cash and Carry and Fry's. U.S.
8 Smokeless moved to dismiss on all counts. Each count will be considered in turn.

9 **A. Breach of Contract**

10 Cash and Carry has failed to state a claim for breach of contract because it has failed
11 to allege one of the elements of contract formation: consideration. The alleged promise "is
12 not enforceable at law for the lack of a bargained-for-exchange." *Chewning v. Palmer*, 133
13 Ariz. 136, 138, 650 P.2d 438, 440 (1982); *accord Muchesko v. Muchesko*, 191 Ariz. 265,
14 268, 955 P.2d 21, 24 (Ct. App. 1997). Cash and Carry alleges that on two occasions, U.S.
15 Smokeless agreed to accept returns of its products. At the same time, Cash and Carry admits
16 that it had no distribution agreement with U.S. Smokeless. There is no indication that by
17 promising to take returns, U.S. Smokeless obtained any bargained-for benefit for itself or
18 detriment to Cash and Carry. *See K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass'n*, 139
19 Ariz. 209, 212, 677 P.2d 1317, 1320 (Ct. App. 1983).

20 There is no merit to Cash and Carry's argument that by promising to accept the
21 returns, U.S. Smokeless obtained certain intangible benefits, and that these benefits
22 constituted consideration. It may be true, as Cash and Carry claims, that these promises
23 "smoothed over" the parties' relations in the short term and created an appearance of fair
24 dealing that may have impressed the managers of Fry's. Neither of these benefits was
25 bargained-for in the contractual sense; they are benefits that would attend any number of
26 gratuitous promises that are not enforceable in contract. *See Perry v. Farmer*, 47 Ariz. 185,
27 188, 54 P.2d 999, 1001 (1936). The same principle governs Cash and Carry's argument that
28 it suffered a detriment by relying on the promises—allowing Fry's to return the products in

the first instance, and abstaining from a fire-sale in the second. Equity may afford redress in such a case, as explained below, but legal consideration is lacking. There is no allegation that U.S. Smokeless sought, through its promises, to control Cash and Carry's actions in the manner Cash and Carry describes. These actions were not bargained for, so they were not consideration. *See Hartford v. Indus. Comm'n of Ariz.*, 178 Ariz. 106, 110, 870 P.2d 1202, 1206 (1994).

B. Breach of the Implied Covenant of Good Faith

Although Cash and Carry's Complaint is vague, its Opposition brief (Doc. # 13 at 8-9) makes clear that its claim for breach of the implied covenant of good faith and fair dealing (Second Claim) is grounded on the alleged oral contract to accept returns from Fry's, promises allegedly "made . . . in bad faith, with no intention of following through." *Id.* at 9.

Because no such contract between U.S. Smokeless and Cash and Carry is sufficiently alleged, the implied covenant of good faith and fair dealing could not attach to it. Thus, there could be no breach of the implied covenant of good faith and fair dealing. That covenant does not arise in the absence of a contractual relationship. *Norman v. State Farm Mut. Auto Ins. Co.*, 201 Ariz. 196, 203, 33 P.3d 530, 537 (Ct. App. 2001); *see also Rawlings v. Apodaca*, 151 Ariz. 149, 154, 726 P.2d 565, 570 (1986); *Restatement (Second) of Contracts* § 205 (1981).

Cash and Carry does not allege or argue any other contract that was breached by lack of good faith and fair dealing.

C. Promissory Estoppel

Regardless of its failure to allege any breach of contract, however, Cash and Carry may yet proceed with its action under the doctrine of promissory estoppel.¹ Cash and Carry has alleged that on two specific occasions, U.S. Smokeless promised to accept returns of its products. It further alleges that Cash and Carry took U.S. Smokeless at its word and

¹ As part of its general claim of unjust enrichment, Cash and Carry alleges that it detrimentally relied on promises by U.S. Smokeless. The parties address this portion of the claim under the separate heading of promissory estoppel, and the Court follows suit.

1 reasonably relied on each of these promises to its detriment. These allegations will support
2 a claim for equitable relief. *Chewning*, 133 Ariz. at 138, 650 P.2d at 440; *Higginbottom v.*
3 *State*, 203 Ariz. 139, 144, 51 P.3d 972, 977 (Ct. App. 2002). In the first instance, Fry's had
4 asked Cash and Carry whether a return of expired U.S. Smokeless products was possible.
5 U.S. Smokeless said it would accept returns, and Cash and Carry took the expired products
6 back from Fry's in reliance on this promise. Cash and Carry bore the loss when U.S.
7 Smokeless refused the returns. In the second instance, Cash and Carry placed an order for
8 U.S. Smokeless products unaware that it no longer had any sale to make at Fry's. The
9 problem was realized before the tobacco products expired, and allegedly U.S. Smokeless
10 agreed once again to accept the return via Sam's Club. The return was ultimately refused
11 once the product had expired and lost any liquidation value it might have had. It was not
12 unreasonable to rely on both promises; U.S. Smokeless could plausibly be expected to accept
13 returns under either set of circumstances, and Cash and Carry had no "knowledge to the
14 contrary." *Higginbottom*, 203 Ariz. at 144, 51 P.3d at 977.

15 U.S. Smokeless attempts to avoid this cause of action by reformulating the facts. This
16 effort is unavailing. Contrary to the suggestions of U.S. Smokeless, the allegations explicitly
17 state that Cash and Carry accepted returns from Fry's in reliance on the first promise. The
18 allegations also explain that Cash and Carry relied in the second instance by declining to
19 liquidate its unsold tobacco products—there is no assertion that Cash and Carry relied by
20 ordering from Sam's Club. Cash and Carry placed that order before it learned that Fry's
21 would not be purchasing, and before the promise was made to accept return of that sale.

22 Finally, U.S. Smokeless argues that any claim for promissory estoppel must fail
23 because equitable relief is not available where an express contract governs the subject of the
24 dispute. It is true that promissory estoppel cannot be used by parties to circumvent the terms
25 of their express agreements. *See Mann v. GTCR Golder Rauner LLC*, 425 F. Supp. 2d 1015,
26 1032 (D. Ariz. 2006). It is also true that in some cases, estoppel is unavailable even though
27 the express contract is not between the plaintiff and the defendant. *See Stratton v.*
28 *Inspiration Consol. Copper Co.*, 140 Ariz. 528, 531, 683 P.2d 327, 330 (Ariz. App. 1984);

1 *In re New Motor Vehicles Can. Export Antitrust Litig.*, 350 F. Supp. 2d 160, 210 (D. Me.
 2 2004). The cases cited by U.S. Smokeless are distinguishable from the case at bar, however.
 3 Cash and Carry's position is not akin to that of a subcontractor attempting to recover against
 4 a third party for the general contractor's non-payment under the subcontract. *See Stratton*,
 5 140 Ariz. at 529-30, 683 P.2d at 328-29. Nor is Cash and Carry trying to sue up the chain
 6 of distribution for an equitable redetermination of retail purchase price. *See Antitrust Litig.*,
 7 350 F. Supp. 2d at 210. The alleged promises by U.S. Smokeless arose subsequent to, and
 8 independent of, Cash and Carry's contractual relationship with Sam's Club. They were a
 9 gratuitous benefit, conferred and made enforceable after the fact by detrimental reliance. On
 10 the face of the complaint, no Sam's Club contract gives U.S. Smokeless refuge from its own
 11 separate promises. In effect, these promises are collateral transactions, the subject matter of
 12 which is not governed by any express agreement. *See Mann*, 425 F. Supp. 2d at 1032.

13 **D. Other Unjust Enrichment**

14 Cash and Carry does not limit its equitable claim to promissory estoppel, but alleges
 15 and argues unjust enrichment on a broader level. "To establish a claim for unjust enrichment,
 16 a party must show: (1) an enrichment; (2) an impoverishment; (3) a connection between the
 17 enrichment and the impoverishment; (4) the absence of justification for the enrichment and
 18 the impoverishment; and (5) the absence of a legal remedy." *Trustmark Ins. Co. v. Bank*
 19 *One, Ariz., NA*, 202 Ariz. 535, 541, 48 P.3d 485, 491 (Ct. App. 2002). The allegations state
 20 that in connection with Cash and Carry's loss, U.S. Smokeless "avoided the financial
 21 liability" of accepting the returns.² Cash and Carry also alleges that U.S. Smokeless enjoyed
 22 "enhanced customer satisfaction" by promising to accept returns.

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 24 ² Cash and Carry states that U.S. Smokeless "was able to sell Cash and Carry's final
 25 order for Fry's twice; once to Cash and Carry and again to Fry's after U.S. Smokeless took
 26 over the account." The equitable appeal of this statement is superficial. U.S. Smokeless did
 27 not sell the same lot twice—a situation that might cry out for restitution. Rather, U.S.
 28 Smokeless made two sales of two separate lots, one of which was a losing deal for Cash and
 Carry. The loss associated with that sale is identical to the "financial liability" avoided by
 rejecting the returns.

1 The enrichment pled—avoidance of financial liability—is functionally identical to the
2 reliance damages pled under the heading of promissory estoppel. This enrichment is unjust
3 if it is proven that Cash and Carry reasonably relied on U.S. Smokeless’s promises. Cash and
4 Carry pleads no other basis for equitable relief. The allegations make out no plausible,
5 unjustified connection between Cash and Carry’s loss and U.S. Smokeless’s customer
6 goodwill. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). Therefore, no claim
7 for unjust enrichment has been stated, except to the extent that it finds expression in the
8 doctrine of promissory estoppel.

9 **E. Tortious Interference**

10 In its last two claims for relief, Cash and Carry asserts tortious interference with
11 contract and tortious interference with business expectancy. The pleadings are not clear as
12 to the scope or terms of any specific contract with Fry’s. A contract existed between the
13 parties as to certain tobacco transactions but not others. Regardless of this uncertainty,
14 however, Cash and Carry has failed to plead any improper interference on the part of U.S.
15 Smokeless. For that reason, both interference claims are insufficient.

16 In Arizona, a claim for intentional interference with contract or business expectancy
17 requires the plaintiff to prove that the defendant knew of and intentionally interfered with
18 such a relationship. *Neonatology Assocs., Ltd. v. Phoenix Perinatal Assocs. Inc.*, 216 Ariz.
19 185, 187, 164 P.3d 691, 693 (Ct. App. 2007). “In addition, the interference must be improper
20 as to motive or means before liability will attach.” *Id.*

21 Cash and Carry claims that U.S. Smokeless brought about the end of its relationship
22 with Fry’s. It argues that this action was improperly motivated by racial animus toward Cash
23 and Carry’s members, who are of Middle-Eastern descent. Such allegations, if true, are
24 regrettable, but they will not support an intentional interference claim in this instance. The
25 competition privilege protects the conduct. *See Miller v. Hehlen*, 209 Ariz. 462, 471, 104
26 P.3d 193, 202 (Ct. App. 2005). Cash and Carry alleges that U.S. Smokeless took over the
27 Fry’s account by shipping directly to the Fry’s parent company rather than to an independent
28 middle man. U.S. Smokeless’s choice was therefore a competitive one; U.S. Smokeless

1 competed with Cash and Carry for the Fry's account. "[A] competitor does not act
2 improperly if his purpose at least in part is to advance his own economic interests." *Id.*

3 **F. Conclusion**

4 Except for the promissory estoppel claims, the Complaint as written states no claim
5 for relief. Plaintiff has not sought leave to amend or suggested how the Complaint might be
6 cured as to any of the deficiencies. Therefore, the motion to dismiss will be granted, with
7 prejudice, except for the promissory estoppel claims.

8 IT IS THEREFORE ORDERED that the Defendant's Motion to Dismiss for failure
9 to state a claim is denied as to the promissory estoppel and granted in all other respects.

10 IT IS FURTHER ORDERED that Plaintiff's Complaint is dismissed with prejudice
11 for failure to state a claim upon which relief can be granted, except for promissory estoppel.

12 DATED this 7th day of November, 2008.

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Neil V. Wake
United States District Judge
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